

**STATE OF NEW HAMPSHIRE**  
**DEPARTMENT OF LABOR**  
**CONCORD, NEW HAMPSHIRE**



V

**DTZ, A UGL COMPANY**

**DECISION OF THE HEARING OFFICER**

**Nature of Dispute:** RSA 275-E 4 I Whistleblowers' Protection Act

**Employer:** DTZ, a UGL Company, 101 Federal Street, Suite 700, Boston, MA 02110

**Date of Hearing:** February 4, 2013

**Case No.** 44667

**BACKGROUND AND STATEMENT OF THE ISSUES**

A Whistleblowers' Complaint was filed with the Department of Labor on October 15, 2012. The claimant filed under the provisions of RSA 275-E; 2 I (a), that he was illegally terminated for protested reporting. Under the provisions of RSA 275-E 2 I (b), he alleges that he was terminated for participating in a legal hearing. And, under RSA 275-E: 3, he says that he was terminated for his refusal to follow and illegal directive.

The claimant is requesting his back pay and that his Personnel File be cleared of any reference to this complaint. The claimant is seeking 261 hours of work for a total amount of \$4,661.46.

The claimant testified that in April of 2012 he had refused to maintain flower beds that were put in by volunteers at a local school. Because of his refusal he received a disciplinary action.

The incident that he reported was his refusal to measure out grade stakes for a playground. The claimant stated that the process he was asked to perform had to be done by a person certified to perform such duties. The claimant did not want to install the new equipment because of the potential liability. He also did not want to stake out the section where the equipment was to be installed because he was informed that the fields were handled by unionized employees and should not be part of his job.

The claimant felt that the drawings from which he was to stake out the field could have led to some liability on his part if there were any injuries from children playing on the installed

equipment. Not so much from the equipment but if he measured the “apron space” wrong, he could be sued and the instructions said that only a certified person could install the project.

He reported his concerns to his superiors and was terminated. The claimant further stated that he checked with a relative who is in the construction business and he was told that he could be liable if he marked out a “fall zone” incorrectly.

The employer said that the Principal of the school where the project was to be located asked for help in laying out the area. The claimant was asked to do this and raised questions on his certification by the City, and his responsibility of going to work in an area that was covered by a union contract. The claimant told the employer of his concerns and was told that all he had to do was to stake out a piece of land where the new playground would be assembled. The claimant would not handle any of the equipment or assist in the assembly of the playground apparatus. The employer said that the certification of an employee to do the work was to be processed by the employer. There was no actual official certification and training to be completed.

The claimant also raised issues about a trailer used to haul equipment and the condition of the actual trailer. The employer order the trailer into service and it was used. The claimant was called into a meeting where his insubordination was discussed. The meeting became heated and the decision was made to terminate the claimant. This decision was not based entirely on the playground issue but on a multitude of insubordination issues.

### **FINDINGS OF FACT**

RSA 275-E:4 Rights and Remedies. –

- I. Any employee who alleges a violation of rights under RSA 275-E:2 or 3, and who has first made a reasonable effort to maintain or restore such employee's rights through any grievance procedure or similar process available at such employee's place of employment, may obtain a hearing with the commissioner of labor or a designee appointed by the commissioner. Following such hearing, the labor commissioner or the designee appointed by such commissioner shall render a judgment on such matter, and shall order, as the commissioner or his designee considers appropriate, reinstatement of the employee, the payment of back pay, fringe benefits and seniority rights, any appropriate injunctive relief, or any combination of these remedies.

Decisions rendered by the commissioner of labor under paragraph I may be appealed pursuant to RSA 541.

This is the Whistleblowers' Protection Act. It is the intent of this act to see that employee can report illegal actions and refuse to participate in an illegal order. The employee can also participate in investigations without fear of reprisals.

It is the finding of the Hearing Officer, based on the exhibits and the testimony presented for the hearing, that the complaint is unfounded. The claimant has the burden to present a case that shows the discipline he received was because of his refusal to accept an illegal order. The claimant did not bear this burden.

It is found that the claimant may have been concerned about duties he was asked to perform but none of those duties were illegal. The claimant appears to have placed obstacles in the way of his performance of duties and the claimant sought advice from people not participating in the project. The claimant did report certain concerns and they were addressed. The employer has a responsibility to monitor employee assignments and make sure the work is safe and free from employee liability. The claimant did not prove that this was not being done.

The employer said that there were issues with the claimant in the past up to an including disciplinary action. The claimant presented unnecessary obstacles in the employer's way and he sought to block legal orders with unfounded questions and unfounded charges.

The Whistleblowers' Complaint is unfounded.

As required by Appeal of Mary Ellen Montplaisir 147 N.H. 297 (2001), this Department is required to apply a "mixed motive" analysis because of the direct evidence presented. Under this analytical framework, the claimant has the initial burden of persuasion. If the claimant meets this burden, the burden of persuasion shifts to the employer to show that despite the retaliatory animus, it would have made the same adverse employment decision for legitimate, non-retaliatory reasons. As long as the claimant can meet the evidentiary burden required by the "mixed motive" analysis, the burden of persuasion remains with the employer.

The claimant did not take the burden of persuasion off himself.

### **DECISION**

The Whistleblowers' Complain is invalid.

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Thomas F. Hardiman  
Hearing Officer

Date of Decision: February 20, 2013

Original: Claimant  
cc: Employer

TFH/all